

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
TAUNUS CORPORATION	:	DETERMINATION
	:	DTA NO. 819623
for Revision of a Determination or for Refund of Real	:	
Estate Transfer Tax under Article 31 of the Tax Law	:	
for the Year 1999.	:	

Petitioner, Taunus Corporation, c/o Deutsche Bank, 60 Wall Street, 14th Fl., Corp. Tax Dept., New York, New York 10005-2836, filed a petition for revision of a determination or for refund of real estate transfer tax under Article 31 of the Tax Law for the year 1999.

On March 3, 2004 and March 12, 2004, respectively, petitioner, appearing by Roberts & Holland LLP (Carolyn Joy Lee, Esq., of counsel) and the Division of Taxation, appearing by Christopher C. O'Brien, Esq. (Barbara J. Russo, Esq., of counsel), waived a hearing and agreed to submit the matter for determination based on documentation and briefs to be submitted by July 28, 2004, which date commenced the six-month period for issuance of this determination. After review of the evidence and arguments presented, Winifred M. Maloney, Administrative Law Judge, renders the following determination.

ISSUE

Whether the Division of Taxation properly determined that petitioner owed additional real estate transfer tax for the acquisition of a controlling interest in Bankers Trust Corporation.

FINDINGS OF FACT

1. On March 1, 2004 and March 3, 2004, respectively, Taunus Corporation (“Taunus” or “petitioner”) and the Division of Taxation (the “Division”) entered into a written stipulation of facts, the contents of which have been substantially incorporated into the following Findings of Fact.

2. Bankers Trust Corporation (“Bankers Trust”) was a publicly traded New York corporation, and the parent company of a group of corporations engaged in the banking business. Taunus Corporation (“Taunus”) is a wholly-owned subsidiary of Deutsche Bank A.G., an Aktiengesellschaft organized under German law.

3. The acquisition of a controlling interest in Bankers Trust occurred on June 4, 1999. On that date, Bankers Trust merged into Circle Acquisition Corporation (“Circle”), a wholly-owned subsidiary of Taunus, with Bankers Trust surviving and becoming a wholly-owned subsidiary of Taunus (the “merger”).

4. The merger was effectuated under the New York Business Corporation Law by filing a Certificate of Merger with the Secretary of State of the State of New York. The Certificate of Merger of Circle into Bankers Trust under Business Corporation Law § 904 (the “certificate of merger”) was filed in New York by the New York Secretary of State at 4:41 P.M., on June 3, 1999. Pursuant to the terms of the certificate of merger and as permitted under New York law, the merger was effective on June 4, 1999.

5. Pursuant to the merger, Taunus acquired all of the stock of Bankers Trust for a total purchase price of approximately \$9 billion (\$93.00 cash per outstanding share of Bankers Trust). The parties made no allocation of the price paid for Bankers Trust stock to any asset owned by Bankers Trust or its subsidiaries.

6. In the merger, and by operation of law, the stock owned by the former Bankers Trust shareholders was exchanged for cash, and Bankers Trust became a wholly-owned subsidiary of Taunus.

7. The merger effected the acquisition of a controlling (100%) interest in Bankers Trust, within the meaning of Article 31 of the Tax Law.

8. At the time of the merger, Bankers Trust had interests in the following nine properties:

A. 130 Liberty Street - - BT Plaza, New York, New York

B. 4 Albany Street, New York, New York

C. 1290 Avenue of the Americas, New York, New York

D. 14 Wall Street, New York, New York

E. 280 Park Avenue, New York, New York

F. 4 World Trade Center, New York, New York

G. Newburgh Mall, 313 Broadway, Newburgh, New York

H. 1806 Deer Park Avenue, Deer Park, New York

I. Altamont Farms, Highland, New York

9. Properties A and B were owned in fee. Properties C, D, E and F were leasehold interests under which Bankers Trust was the tenant of a third-party lessor. Property G was owned by a partnership in which Bankers Trust held a 50% partnership interest. Properties H and I were owned by a trust in which Bankers Trust had a 75% interest.

10. The interests in real property owned by Bankers Trust at the time of the merger (collectively the "Bankers Trust real estate") were reported on the Form TP-584 Combined Real Estate Tax Return (the "real estate transfer tax return") filed by the shareholders of Bankers Trust, as grantors, and Taunus, as grantee (collectively the "taxpayers"), on June 18, 1999. Real

estate transfer tax in the amount of \$588,356.00 was paid to the Division with the real estate transfer tax return.

11. Taxpayers attached a rider to the form TP-584 real estate transfer tax return listing, among other things, the following property valuations for the interests in real property owned by Bankers Trust at the time of the merger.

Property Valuations

A. 130 Liberty - - BT Plaza	\$180,000.000.00
B. 4 Albany Street	7,100,000.00
C. 1290 Avenue of Americas	7,444,600.00
D. 14 Wall Street	(24,070,509.00)
E. 280 Park Avenue	(17,089,892.00)
F. 4 World Trade	(9,722,008.00) ¹
G. 1808 Deer Park Ave.	185,000.00
H. Newburgh Mall, 313 Broadway	2,081,722.00
I. Altamont Farms	<u>1,159,800.00</u>
Total	\$147,088,713.00

12. The Division does not dispute the values reported for properties A, B, C, G, H and I. For each of the properties D, E, and F, Bankers Trust engaged the real estate brokerage firm of Insignia/Edward S. Gordon (“Insignia”) to report on the terms at which Bankers Trust could sublease its space to third parties. For the leasehold interests in properties D, E, and F, Insignia provided the initial fair market rentals per square foot and certain rental increases at five-year increments, together with the amounts of standard inducements.

¹ The Stipulation of Facts misstates the value of the 4 World Trade Center leasehold as (\$9,722,088.00). The correct value reported on the real estate transfer tax return is (\$9,722,008.00).

13. For each of the properties D, E, and F, Bankers Trust then performed a computation, deducting certain costs from the initial fair market rentals to produce what it designated as “leasehold negative equity.” Based on these computations, the taxpayers reported the values of properties D, E and F as follows: property D, 14 Wall Street at (\$24,070,509.00); property E, 280 Park Avenue at (\$17,089,892.00); and property F, 4 World Trade Center at (\$9,722,008.00). The Division does not dispute the methodology used by the taxpayers to calculate the “leasehold negative equity” values, but it does not concede that these amounts represent the “fair market value” of the leasehold interests for purposes of determining consideration under the real estate transfer tax. Moreover, it is the Division’s position that the “leasehold negative equity” values are neither relevant nor material to the issue at hand.

14. As noted above, in computing taxable consideration on the real estate transfer tax return, the taxpayers added together the values of all nine properties constituting the Bankers Trust real estate, reporting a total taxable consideration for the Bankers Trust real estate of \$147,088,713.00.

15. The Division issued a Notice of Determination (“Notice”), dated May 16, 2002, to Taunus asserting additional real estate transfer tax due in the amount of \$203,530.00, plus interest of \$46,491.49 for a current balance due of \$250,021.49. This was the only notice issued in respect of the acquisition of Bankers Trust. The Attachment to Notice of Determination (“attachment”) provided, in pertinent part, the following explanation for the determination of the additional tax due:

Pursuant to New York State Tax Law Article 31, Section 1411, the commissioner of taxation and finance has determined an additional amount of tax due for the transaction of June 04, 1999, by which Taunus Corporation acquired 100% of the stock of Bankers Trust Corporation.

Your Real Estate Transfer Tax return (form TP-584) reported total consideration of \$147,088,713 for the real property interests acquired as part of that transaction. This figure was derived by netting all real property interests transferred, combining those having positive values with those leasehold interests having negative value.

Our department's position is that negative value leaseholds may not be used to offset the value of other real property interests having a positive value. . . .

Accordingly, your tax liability has been re-computed [sic] based on the values of the real property interests as you reported them, but without offsetting negative values against positive ones.

16. The Division calculated the real estate transfer tax based on the separate values of properties A, B, C, G, H and I, calculating the real estate transfer tax by reference to total consideration of \$197,971,122.00. The Attachment to the Notice contained the following recomputation of the real estate transfer tax.

Fair Market Value (positive value) Real Property Interests

[A] 130 Liberty - BT Plaza	\$180,000,000.00
[B] 4 Albany Street	\$7,000,000.00
[C] 1290 Ave. of Americas Lease	\$7,444,600.00
[G] Newburgh Mall	\$2,081,722.00
[H] 1808 Deer Park Ave.	\$185,000.00
[I] Altamont Farms	\$1,159,800.00
Total Consideration	<u>\$197,971,122.00</u>
Tax Due @ \$2.00 per \$500.00 of Consideration	\$791,886.00
Less: Tax Previously Paid	(588,356.00)
Additional Tax Due	<u>\$203,530.00</u>

17. On July 31, 2002, Taunus filed a timely request for a conciliation conference. The Bureau of Conciliation and Mediation Services issued a Conciliation Order (CMS No. 193063) dated June 6, 2003 sustaining the statutory notice.

18. On August 21, 2003, Taunus filed a timely petition for review of the Notice of Determination with the Division of Tax Appeals.

19. On October 29, 2003, the Division filed a timely Answer to the petition.

20. Petitioner submitted 14 proposed findings of fact. In accordance with State Administrative Procedure Act § 307(1), all the proposed findings of fact have been incorporated into these Findings of Fact except number “13” which is rejected because it is an ultimate conclusion of law.

SUMMARY OF THE PARTIES’ POSITIONS

21. This matter presents a legal question as to the proper computation of the “consideration” for the merger, within the meaning of the real estate transfer tax. It is petitioner’s position that the “leasehold negative equity” values are taken into account in calculating taxable consideration for the merger. It is the Division’s position that the “leasehold negative equity” values are neither relevant nor material to the issue at hand, and further that the “leasehold negative equity” values may not be used to offset the value of the other real property interests having a positive value. If petitioner’s interpretation of the real estate transfer tax is upheld, it is agreed by the parties that the taxable consideration for the merger is \$147,088,713.00. If the Division’s interpretation of the real estate transfer tax is upheld, it is agreed that the taxable consideration for the merger is \$197,971,122.00.

CONCLUSIONS OF LAW

A. Tax Law § 1402(a) provides, in pertinent part, that “[a] tax is hereby imposed on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars. . . .”

B. Tax Law § 1401(e) defines “conveyance” as pertains to the matter at issue, as follows:

‘Conveyance’ means the transfer or transfers of any interest in real property by any method, including but not limited to sale, exchange, assignment, surrender, mortgage foreclosure, transfer in lieu of foreclosure, option, trust indenture, taking by eminent domain, conveyance upon liquidation or by receiver, or *transfer or acquisition of a controlling interest in any entity with an interest in real property*. (Emphasis supplied.)

C. Tax Law § 1401(c) defines “real property” as:

[E]very estate or right, legal or equitable, present or future, vested or contingent, in lands, tenements or hereditaments, including buildings, structures and other improvements thereon, which are located in whole or in part within the state of New York. It shall not include rights to sepulture.

D. Tax Law § 1401(f) provides that:

‘Interest in the real property’ includes title in fee, a leasehold interest, a beneficial interest, an encumbrance, development rights, air space and air rights, or any other interest with the right to use or occupancy of real property or the right to receive rents, profits, or other income derived from real property. It shall also include an option or contract to purchase real property. It shall not include a right of first refusal to purchase real property.

20 NYCRR 575.7(d) provides that:

(1) An interest in real property includes a leasehold interest and an option or contract to purchase real property. Therefore, the transfer of a leasehold interest, regardless of the term, or the transfer of an option or contract to purchase real property, by assignment or surrender, is a conveyance subject to tax.

(2) The consideration in the case of an assignment of a leasehold interest or an option or contract to purchase real property is the amount paid for the assignment by the assignee to the assignor, *i.e.*, the lessee under the lease or the person who is assigning his rights to purchase the property under the option or contract. The consideration in the case of a surrender of a leasehold interest or option or contract to purchase real property is the amount paid for the surrender

by the lessor to the lessee or by the owner of the real property to the person who is surrendering his rights to purchase the property under the option or contract. However, no tax will be imposed in the case of an assignment of a leasehold interest or an option or contract to purchase real property if the assignor pays consideration to the assignee to accept the assignment. Further, no tax will be imposed in the case of a surrender of a leasehold interest or an option or contract to purchase real property if the lessee or the person who is surrendering his rights to purchase the property under the option or contract pays consideration to the lessor or owner of the real property to accept the surrender.

E. Tax Law § 1401(d)(iii) provides “[i]n the case of a controlling interest in any entity that owns real property, consideration shall mean the fair market value of the real property or interest therein, apportioned based on the percentage of the ownership interest transferred or acquired in the entity.”

20 NYCRR 575.1(l) defines the term “fair market value” as:

[T]he amount that a willing buyer would pay a willing seller for real property. It is generally determined by a[n] appraisal based upon the value of the real property at the time of conveyance. It is not net fair market value, which is fair market value less the amount of any mortgages on the property.

F. In the instant matter, on June 4, 1999, Taunus acquired the controlling (100%) interest of Bankers Trust within the meaning of Article 31 of the Tax Law. At the time of the merger, Bankers Trust had interests in nine properties. The parties to the merger made no allocation of the purchase price for Bankers Trust stock to any asset owned by Bankers Trust or its subsidiaries. Values were determined for all nine interests in real property owned by Bankers Trust with six interests (properties A, B, C, G, H and I) having positive values and the leasehold interests in 14 Wall Street, 280 Park Avenue and 4 World Trade Center (properties D, E and F) having negative values. On the real estate transfer tax return filed, petitioner aggregated the values of all nine interests in real estate and determined the total consideration for the merger to be \$147,088,713.00 and computed the real estate tax transfer due accordingly. Using the values of the real property interests as reported by petitioner, but without offsetting negative values

against positive ones, the Division recomputed the total consideration to be \$197,971,122.00 and issued a Notice of Determination asserting additional real estate transfer tax due. The question to be resolved here is how to determine the amount of taxable consideration for the merger within the meaning of the real estate transfer tax.

Petitioner argues that in determining the taxable consideration for the merger, Tax Law § 1401(d)(iii) imposes real estate transfer tax measured by the value of “the” corporate real property. It contends that the phrase “the fair market value of the real property” must be interpreted to mean the value of all of the Bankers Trust real property, not just the value of some of the Bankers Trust real property. Petitioner further asserts that the obligation to take every property into account is made even more clear by the use of the defined term “real property” in the definition of consideration. It points out that under Tax Law § 1401(c), “real property” is defined to mean “every estate or right . . . in lands . . . located . . . within the State of New York.” Petitioner also points out that Tax Law § 1401(f) specifically provides that a leasehold interest is an interest in real estate. It contends that by putting the statutory definitions together, the real estate transfer tax statute provides that “in the case of a controlling interest in any entity that owns real property, consideration shall mean the fair market value of every estate or right in lands located within the State of New York” (Petitioner’s brief, pp. 6-7). Petitioner argues that the statute specifies that every interest in real property owned by Bankers Trust at the time of the merger be counted in determining the taxable consideration for the acquisition of Bankers Trust. It points out that the dictionary definition of “every” is “each individual or part of a group without exception” (Webster’s Collegiate Dictionary 402 [10th ed 1993]). Petitioner claims that by excluding from the calculation of taxable consideration the fair market value of three of Bankers Trust’s nine properties, and basing the tax on the values of only six of the interests in

real property owned by Bankers Trust, the express requirement of the statute that “every” interest be counted is violated. Therefore, petitioner asserts that the fair market value of “every” interest in real property owned by Bankers Trust totaled \$147,088,713.00 and that amount is the correct amount of taxable consideration under the real estate transfer tax.

G. As noted above, the real estate transfer tax is imposed on each conveyance of real property or interest therein when the consideration exceeds five hundred dollars (Tax Law § 1402[a]). “Conveyance” is defined as “the transfer or transfers of any interest in real property . . . including . . . [a] transfer or acquisition of a controlling interest in any entity with an interest in real property” (Tax Law § 1401[e]). In the case of a controlling interest in any entity that owns real property, consideration means the fair market value of the real property or interest therein, apportioned based upon the percentage of the ownership interest transferred or acquired in the entity (Tax Law § 1401[d][iii]). The regulations provide that “fair market value” is the amount a willing buyer will pay a willing seller for real property (*see*, 20 NYCRR 575.1[1]). With respect to leasehold interests, the regulations provide that no tax will be imposed in the case of an assignment of a leasehold interest if the assignor pays consideration to the assignee to accept the assignment, i.e., the leasehold interest has a negative value² (*see*, 20 NYCRR 575.7[d][2]). As noted above, in arriving at the total consideration for the merger, petitioner determined that Bankers Trust’s leasehold interests in 14 Wall Street, 280 Park Street and 14 World Trade Center had negative values and offset these negative values against the positive values determined for the other six interests in real property owned by Bankers Trust at the time of the merger. The Division recomputed the taxable consideration for the merger using the values of the real

² In the case of a leasehold interest with a negative value, the consideration would be the relief from the terms of the overpriced lease.

property interests as reported by petitioner, but without offsetting negative values against positive values. Since the leasehold interests in 14 Wall Street, 280 Park Street and 4 World Trade Center have negative values, the conveyance of these interests as part of the merger is nontaxable for real estate transfer tax purposes. Inasmuch as the regulations provide that no tax will be imposed where a leasehold interest has a negative value, the Division correctly excluded the negatively valued leasehold interests from its determination of the taxable consideration for the merger (20 NYCRR 575.7[d][2]). If petitioner were allowed to offset the nontaxable negatively valued leasehold interests against the interests in real property with positive values, the tax base (the taxable consideration) would be improperly calculated.

H. Petitioner's argument that the fair market values (positive and negative values) of all interests in real property owned by Bankers Trust at the time of the merger should be aggregated in determining the taxable consideration for the acquisition of Bankers Trust is without merit. As the Division correctly points out, there is no statutory authority in the Tax Law or the regulations to aggregate the fair market values of all the interests in real property owned by an entity upon the acquisition of a controlling interest in such entity for purposes of determining the real estate transfer tax. Where there has been a transfer or acquisition of a controlling interest in an entity with an interest in real property, the real estate transfer tax is computed based upon the fair market value of each separate and distinct interest in real property. Thus, for the leasehold interests in 14 Wall Street, 280 Park Avenue and 4 World Trade Center that have been determined to have negative values, no real estate transfer tax is imposed (*see*, 20 NYCRR 575.7[d][2]). Only the six interests in real property having positive fair market values exceeding \$500.00 are subject to the real estate transfer tax (Tax Law § 1402[a]).

The definition of the term “conveyance” was added to Tax Law § 1401(e) by chapter 61 of the Laws of 1989 which simultaneously repealed former subdivision (b) of the same section which contained the definition of the term “deed.” The section was amended for a very specific purpose, to wit: to broaden the base of the real estate transfer tax to capture the conveyance of an economic interest in real property, including when property is sold through other than a deed transfer. The legislative history contained in the bill jacket for chapter 61 of the Laws of 1989 states:

There is little, if any, economic justification that allows non-deeded transfers to go untaxed. This proposal would ‘level the playing field’ since all property would be taxed upon transfer in the same manner and such transfers would be based on economic value rather than on tax considerations. It is inequitable that a homeowner selling his home for \$50,000 must pay the real estate transfer tax, but a multi-billion dollar corporation can effect a transfer of title to its property for \$100 million in a form so as to avoid taxation. The proposed expansion of the tax base would eliminate the preferential treatment now accorded the latter type of transaction (Memorandum in Support, p. 37).

Petitioner maintains that the real estate transfer tax is imposed on the amount a willing buyer would pay to acquire Banker Trust’s real property, all nine interests. It claims that amount is only \$147,088,713.00, not the \$197,971,122.00 determined by the Division. Petitioner contends that no willing buyer would pay \$197,971,122.00 for the nine interests in real property Bankers Trust owned because they were not worth that much. If the entity transfer at issue was a direct transfer of real estate, no real estate transfer tax would be imposed on the transfer of the three leasehold interests with negative values (*see*, 20 NYCRR 575.7[d][2]). By offsetting the three negatively valued leasehold interests against the six interests in real property with positive values, the taxable consideration (tax base) is less than it would be if the transaction was a direct transfer of real estate. The intent of the amendment of Tax Law § 1401(e) was to broaden the base of the real estate transfer tax, not to limit it. It is clear that petitioner’s interpretation of the

statute would create an inequity between deeded and non-deeded conveyances and would also limit the imposition of the real estate transfer tax.

I. Petitioner argues that the merger was effected by a single instrument of transfer, the certificate of merger. It points out that the \$9 billion (\$93.00 of cash for each outstanding share of Bankers Trust) price it paid for the conveyance was indivisible and that the parties made no allocation of that price to any specific Bankers Trust asset. Petitioner asserts that the merger is a single transfer for a single consideration. In that circumstance, it claims that the consideration must be determined by aggregating the values of the nine interests in real property owned by Bankers Trust at the time of the merger. Petitioner asserts that the Tribunal's decisions in *Matter of Arbor Hill Associates* (Tax Appeals Tribunal, June 26, 1997), and *Matter of Hebaron Enterprises* (Tax Appeals Tribunal, July 10, 1997) support its position that the transfer of multiple properties will be treated as a single conveyance for a single consideration where the transfer in form is made by a single, indivisible instrument for a single, indivisible price.

Petitioner's reliance upon the *Arbor Hill* and *Hebaron* decisions is misplaced. *Matter of Hebaron Enterprises (supra)* is not relevant to the instant matter since it deals with the provisions of the real property transfer gains tax ("gains tax") under Article 31-B, rather than the real estate transfer tax (*see, Matter of Ziegelman*, Tax Appeals Tribunal, August 18, 1994, [holding that the New York State real estate transfer tax and the Article 31-B gains tax are two separate and distinct taxes and one may not be used to interpret the other]). *Matter of Arbor Hill Associates (supra)* involved the application of the real estate transfer tax to the transfer of title to 27 commercial parcels from one grantor to one grantee, pursuant to a single deed and for the sole consideration equal to the mortgage indebtedness on the property. On the schedule annexed to the real estate transfer tax return, the taxpayer had allocated the mortgage indebtedness (the first

and second mortgages) to each of the 27 separate interests in real property. The taxpayer in *Arbor Hill* claimed that the consideration subject to tax under the real estate transfer tax should be determined by reference to the price allocated to each of the 27 separate interests in real property. Under that interpretation, because no individual parcel had a value of \$500,000.00 or more, the taxpayer contended that it was entitled to the real estate transfer tax deduction for continuing liens that is available for conveyances for which the consideration is less than \$500,000.00. If the *Arbor Hill* taxpayer's interpretation were accepted, the taxable consideration for the transaction would be zero. The Tribunal held that:

The consideration for the undivided interests in the real property conveyed was established by the underlying agreement to convey the real property in lieu of foreclosure for the remaining balance on the two mortgages encumbering all of the parcels constituting the real property. The unity of title, interest in fee, the definition of real property and the indivisibility of the consideration as established by the mortgage balances all lead to the inescapable conclusion that there was but one conveyance. Although it allocated the mortgage balances among the parcels, that is irrelevant to the single transfer of title in fee to, or interest in, all property to one grantee for one consideration which was the price actually paid (Tax Law § 1401[d]) for the estate or right in lands and improvements thereon (Tax Law § 1401[c]). (*Matter of Arbor Hill Associates, supra.*)

Nowhere in the *Arbor Hill* decision did the Tribunal state that the separately allocated considerations shown for the 27 parcels were to be aggregated to determine consideration because there was no need to aggregate since there was in fact only one consideration subject to tax. Thus, contrary to petitioner's argument, the Tribunal's decision in *Arbor Hill* does not provide for the aggregation of consideration. In the instant matter, the form of the transaction is a merger, a non-deeded transfer of the interests in the real property owned by Bankers Trust to Taunus. Pursuant to the merger, Taunus acquired all of the stock of Bankers Trust for a total purchase price of approximately \$9 billion (\$93.00 cash per outstanding share of Bankers Trust). The parties made no allocation of the price paid for the stock to any asset owned by Bankers

Trust. Petitioner determined the values of each of the nine separate interests in real property owned by Bankers Trust at the time of the merger and then aggregated the positive and negative values to arrive at the taxable consideration. Since nine separate interests in real estate were transferred as part of the merger, petitioner cannot aggregate the values of the different real property interests in its calculation of the taxable consideration for real estate transfer tax purposes. Since the three leasehold interests have negative values, the consideration for their transfer is not subject to the real estate transfer tax. Therefore, the taxable consideration for the merger is \$197,971,122.00.

J. The petition of Taunus Corporation is denied and the Notice of Determination dated May 16, 2002 is hereby sustained.

DATED: Troy, New York
January 13, 2005

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE